SUPREME COURT, U. S.
FILED
JAN 4 1966
JOHN F. DAVIS, CLERK

No. 35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

EWING KING, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

REPLY BRIEF FOR PETITIONER

P. D. MAKTOS
JOHN MAKTOS
3700 Massachusetts Ave., N.W.
Washington, D. C. 20016

MOSES KRISLOV
566 Hanna Building
Cleveland, Ohio

HAROLD E. BROWN
The 419 Oak Street Bldg.
Chattanooga, Tennessee

Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 797

EWING KING, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

REPLY BRIEF FOR PETITIONER

No attempt will be made in this Reply Brief to restate material already set forth in the Petition. On the whole, the contentions and allegations advanced in the United States Brief in Opposition (Opp.) are met in the Petition. This Reply Brief, while ignoring numerous erroneous factual and legal contentions of the opposition Brief, will be addressed only to those

propositions in which highly misleading material is presented by the Government.

Statement

Much is made in the opposition Brief of the facts leading up to Partin's becoming a spy for the United States. The Government argues that he was not "placed" in the Hoffa camp, that state officials made the recordings of the phone calls with Partin, that Partin had business of his own in Nashville.

The plain, unrebuttable, but simple fact remains that Partin, in the Hoffa camp, was at all times, from the moment of his entry therein, a spy. Petitioner's contentions have vitality, so long as Partin's role was that of a spy, *regardless of how he became one.* The key fact is that Partin was a spy. This, of course, the Government admits (Opp. 6). Petitioner's position is the more sound since it is unquestioned that at the time of his initial contact with petitioner and Hoffa, Partin was already a secret agent acting for the Government.

Partin's Testimony (Opp. 16)

In its Brief (Opp. 16), the Government attempts to meet the contention of Petitioner (Pet. 23 et seq.) that *Massiah-Escobedo* barred the introduction of many, if not all, of the alleged admissions testified to by Partin.

The Government contends that "[M]assiah and Escobedo plainly relate to government endeavors to obtain admissions as to *past* (sic) offenses . . ." Accepting that very contention, Petitioner urges (Pet.

27) that exclusion was required.[1] In fact, the opposition Brief admits that the evidence was that Petitioner committed the alleged offense on October 27 (Opp. 8). Therefore, the admissions made to Partin after October 27 by Petitioner and Hoffa (e.g., those on October 30, November 5, November 7, November 14 (twice), November 15, November 18 and November 19) concerned, even under the Government's argument, a past offense, and, therefore, should have been excluded.

Moreover, by the Government's own account (Opp. 20), statements testified to by Partin were made by Hoffa incriminating both Hoffa and Petitioner on November 19—clearly a time after all the alleged offenses were complete, and after focus had sharpened on defendants. Indeed, according to the testimony adduced by the Government, not only was the crime solved (*Escobedo*) but virtually all the evidence introduced at trial was already in the Government's possession.

Neither *U. S.* v. *Winters,* 348 F. 2d 204, nor *Vinyard* v. *U. S.,* 335 F. 2d 176 (Opp. 16) are apposite. Both involve a verbal act constituting a crime. *Winters* committed perjury before a grand jury after being carefully advised of his right not to testify. *Vinyard* offered a bribe to liquor agents to "forget" about a crime. In neither instance was there any extrajudicial admission sought or obtained by Government agents. And in each of these cases and *Lopez, infra,* relied on by the Government, the defendants knew that the per-

---

[1] But see Massiah v. U.S., supra, 377 U.S. 212-3, (White J., dissenting): "[a]fter indictment Aiken tried to persuade agent Murphy to go into the narcotics business with him. Under today's decision, Murphy may [not] testify as to the content of this conversation . . ."

sons to whom they were making the statements were Government agents in pursuit of their duties.

In fact, these cases fall within the *Lopez* (*Lopez* v. *U. S.*, 373 U.S. 427) doctrine, which teaches that there is a clear distinction between the obtaining of an admission, and the making of a bribe offer which is in itself a crime. The court in *Lopez* merely "[d]eclined[d] to hold (that) whenever a bribe offer is made in private and the offeree does not intend to accept, that offer is a constitutionally protected communication." *Lopez* stands for nothing more. Indeed, the Chief Justice specifically reserved in his concurring opinion the very issue the Government claims (Opp. 17) *Lopez* laid to rest, and which is the very issue here:

> "This court has not yet established the limits within which the police may use an informer to appeal to friendship and camaraderie-in-crime to induce admissions from a suspect, but suffice it to say here, the issue is substantial." Warren, C.J., 373 U.S. at p. 444.

Reynolds' Testimony (Opp. 38)

There is palpably no substance to the Government's claim that Reynolds' testimony was properly excluded as being collateral. The testimony was a direct attack on the credibility of the Government's key witness by showing that he had attempted to suborn perjured corroboration of his testimony and that he had strong inducements to fabricate (Pet. 17).

It is absurd for the Government to disparage Reynolds' proffered testimony because it related to statements made by Partin "long after the events as to

which he had testified" (Opp. 38). Partin's statements to Reynolds were all the more impeaching the nearer they came to the time of trial, since the statements showed Partin's corrupt motivation to testify falsely.

To the extent that the Sixth Circuit requires that a foundation must be laid for such testimony ("[n]o foundation was laid during Partin's testimony for this impeaching proof" (Opp. 38), it conflicts with the rule in other circuits, *Comer* v. *Pa. R.R.*, 323 F. 2d 868 (C.A. 2); *Ewing* v. *United States*, 135 F. 2d 633, 641-2 (C.A. D.C.), cert. denied 318 U.S. 776; see also 3 Wigmore, *Evidence* (3rd ed.), Sec. 953, 87 A.L.R. 2d 407.

Cautionary Informer Instruction (Opp. 41)

The Government urges that the giving of a cautionary "informer instruction" is discretionary with the trial court, citing *Siglar* v .*United States*, 208 F. 2d 865 (C.A. 5) and *Shettel* v. *United States*, 113 F. 2d 34 (C.A. D.C.).

Shettel was implicitly overruled by *Fletcher* v. *United States*, 158 F. 2d 321 (C.A. D.C.).[2] *Siglar* was severely limited by the later Fifth Circuit case of *Joseph* v. *United States*, 286 F. 2d 468.

The Government's out-of-context quotation from *United States* v. *Becker*, 62 F. 2d 1007, is misleading. There, Judge Learned Hand pointed out that as to the "decoys," because they were awaiting sentence, "there was precisely as much ground to suspect their veracity

---

[2] *Shettel* has never been cited by any court for its holding on this point. See *Shepard's Federal Citator*.

as though they had been formally accomplices.'"[3] Partin was awaiting the disposition of his 26 count federal indictment, and had equally strong motives to please the Government with his testimony. See the later Second Circuit case of *United States* v. *Masino,* 275 F. 2d 129.

And in *Caminetti* v. *United States,* 242 U.S. 470, which the Government contends lays down a rule that failure to give such a cautionary instruction is not reversible error, the court held merely that the instruction there requested was improper and "in the form made should not have been given." (Id. 495). This court has consistently recognized the very real danger of perjury from the mouths of informers and that, therefore, the instruction to the jury is not merely a matter of form. A defendant is "entitled" to have the issue of credibility submitted to the jury with "careful instructions." *On Lee* v. *United States,* 343 U.S. 747, 757; Cf. *Cash* v. *Culver,* 358 U.S. 633.

The Telephone Recordings (Opp. 39)

The Government contends that no request for cross-examination of Partin was made after the transcriptions were made available, and that perhaps the defense attorneys had adopted this as the wiser strategic course.

The fact of the matter is that an unsuccessful request was made for production of these transcriptions under the Jencks Act for purpose of cross-examination. (IV 1968a-1971a, V 2408a-2415a). Every rea-

---

[3] See sentence immediately following the one partially quoted at p. 41 of the Government's Brief. 62 F. 2d at 1009.

sonable effort was made by defense attorneys to obtain cross-examination of Partin in this respect (See Pet. 20-21). The suggestion that yet another request might have been more fruitful to the defense is pure demagoguery. Moreover, failure to comply with the Jencks Act constitutes reversible error without any requirement that the defense request recall of the witness for later cross-examination.

Government Reference to the Fifth Amendment Invocation by Petitioner (Opp. 47)

The Government argues that it had a right to inquire into King's prior invocation of the Fifth Amendment because his testimony that the judge suggested that he not testify implied a personal friendship with the judge. The argument is far-fetched on its face. Moreover, if the Government really wished to rebut a fancied implication of judicial friendship, it could have asked questions on that subject—e.g., "Are you a friend of the judge," or "What did the judge actually say." No such questions of course, were asked.

Likewise, when Hoffa was cross-examined, he could have been asked what he did when King took the stand in Nashville—i.e., whether he raised his hand opening his fingers (or whatever signal he allegedly made). Again the prosecutor did not do this—but sought by his question to *characterize the action as a Fifth Amendment signal.* (See Pet. 13-14).

In short, it is clear that no legitimate purpose was intended by the prosecution, but only the vice proscribed by *Stewart* v. *U. S.,* 366 U.S. 1. The justifications advanced are clearly pure afterthought. And, of course, the heavy-handed reference by the prosecu-

tor to the Fifth Amendment in final argument underscores the plain fact. Indeed the Government does not even seek to justify such misconduct in its Brief, as it cannot.

Respectfully submitted,

P. D. MAKTOS
JOHN MAKTOS
3700 Massachusetts Ave., N.W.
Washington, D. C. 20016

MOSES KRISLOV
566 Hanna Building
Cleveland, Ohio

HAROLD E. BROWN
The 419 Oak Street Bldg.
Chattanooga, Tennessee

Counsel for Petitioner